NO. 49229-6-II

COURT OF APPEALS, DIV. II,
STATE OF WASHINGTON

In re Marriage of Ingersoll

John Ingersoll,

Appellant,

v.

Tomi Lee Ingersoll,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases (Continued)

Statutes

Other Authorities

TABLE OF AUTHORITIES

Other Authorities (Continued)

I. INTRODUCTION

Tomi Ingersoll left John Ingersoll[1] and took their two children to a safe house to escape John's anger and alcohol abuse. John's alcohol abuse exacerbated personality traits which made him behave in impulsive, self-indulgent and short-sighted ways. The children were afraid when he drank. The younger child's therapist observed increased symptoms of trauma before and after visits with John.

The trial court made a specific finding that John's long-term alcohol abuse got in the way of his parenting, and imposed restrictions on his residential time requiring alcohol and psychological treatment. These restrictions were dispositive regarding which parent the children would live with a majority of the time. The trial court declined to find any other basis for parenting limitations on either Tomi or John.

These trial court rulings were not an abuse of discretion because they were well within the range of acceptable choices given the governing law and facts, and were supported by substantial evidence. This Court should decline John's requests that it look behind the trial court's credibility determinations, reweigh the evidence and substitute its judgment for that of the trial court. The trial court's rulings should be affirmed.

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[1] For clarity, the parties' first names are used throughout this brief. No disrespect is intended.

II. COUNTER-STATEMENT OF THE CASE

A. John's long-term alcohol abuse.

John acknowledged drinking to avoid arguments with Tomi, 1 RP 52, and drinking heavily with friends and on the weekends. 3 RP 446, 448; Ex. 34. Tomi testified that shortly before her departure John was drinking as much as a tall bottle of *Vikingfjord*[2] all in one day. 1 RP 200. John acknowledged needing help for his alcohol addiction for a long time, and that his dependence on alcohol was unhealthy. Ex. 32; 3 RP 589. He returned to Alcoholics Anonymous (AA) after Tomi left with the children in May 2012. *Id.* John experienced continuing difficulties with alcohol, including a driving under the influence (DUI) charge in 2013 in Kittitas County. The charge was amended as part of his plea to reckless driving, but John lost his driving privilege for a year because he refused to take a breath test. 1 RP 73-74, 105; Ex. 35. John completed a twelve-week alcohol treatment program through the Veterans Administration (VA) in December 2015. Ex. 24. He self-reported reducing his alcohol consumption, but continued drinking and declined a recommendation for further treatment. *Id.* pp. 1-6; 1 RP 100-101.

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[2] *Vikingfjord* is a vodka from Norway. Vodkabuzz, http://vodkabuzz.com/vodkas/vikingfjord/ (last visited Feb. 7, 2017).

B. Tomi leaves the marriage to escape John's anger.

Tomi's departure with the children on Friday, May 25, 2012 was precipitated by events occurring over the preceding five days. 1 RP 180, 181-198.

On Sunday May 20, John berated Tomi for not being a good mother, demanding that she get up and drink coffee he made for her, and asking the same questions over and over for nearly two hours: Why was she still in bed shortly after 8:00 am? Why had she not made breakfast for the kids? Why hadn't she helped John get ready for work as a police officer in Mattawa? 1RP 182-183. Unsatisfied with her responses, John jumped on Tomi, pinning her down on the bed, and called her "a cunt" with his face right in hers. 1 RP 185. John then got off Tomi, sat on the floor next to the bed, took out his service weapon and pointed it at his own head, saying he couldn't deal with their arguing anymore. 1 RP 186.

John testified this incident lasted only about a half hour. 4 RP 651. He was already fully dressed for work: "She didn't iron my clothes or shine my boots; that's completely false." 4 RP 650. According to John, Tomi responded to his questions by sitting up in bed and angrily saying "I'm not going to drink your coffee," so he told her she looked like the Polergeist as a joke. *Id.* John testified he "never leapt on her, pinned her down, or anything like that." 4 RP 651. John did not specifically deny in

his testimony Tomi's allegation that he wore, drew and pointed his service weapon during this argument. *Id.* Both Tomi and John testified that the couple's two children, KAI and FAI,[3] then ages 9 and 4, were outside the bedroom watching cartoons throughout this incident. 1 RP 184; 4 RP 650.

Tensions arose mid-week when Tomi insisted on attending a support group for family members of alcoholics. 1 RP 189- 192. After seeing John's anger emerge again when he mistreated their dog during a walk on Friday, Tomi "had like a moment of clarity where I just said, if I don't do what John wants me to do tonight, then that's going to be me." 1 RP 195-196. While John was at work on Friday, his AA sponsor Reed Platcha picked up Tomi and the kids and drove them to the Tri Cities, where they went to a shelter. 1 RP 198-199.

C. John makes false Missing Person reports.

Reed Platcha gave John a toll-free telephone number where he could reach Tomi and the kids. 1 RP 54. John's police chief relayed a message from the Grant County Sheriff that his wife and children had left to go to "a safe location." 1 RP 58. John left numerous phone messages for Tomi at the safe house and sent her letters there, acknowledging his drinking problem and begging her to return. Ex. 31, 32; 1 RP 61-64. When she failed to respond, he filed Missing Person Reports with the

[3] Initials are used throughout this brief in place of names for the parties' minor children.

Grant County Sheriff, certifying under oath that the circumstances of Tomi and the children's disappearance were "unknown." Ex. 33. The City of Mattawa cited John's attempts to locate the safe house and "the making of a false missing person report" among its reasons for terminating his employment as a police officer. Ex. 30, p. 3.

D. Tomi files for dissolution and moves to Alaska.

Tomi filed this dissolution action in June 2012 in Grant County. After an initial stay in the shelter, she rented an apartment in Ellensburg and briefly visited relatives in California. She moved in mid-August with the children to Fairbanks, Alaska where her parents live. 1 RP 127-128, 213-215. She informed John and the Superior Court of this move.[4] 1 RP 128. She promptly enrolled the children in school and got a job as a kitchen aide. 1 RP 215-217.

E. GAL investigations, reports and recommendations.

Dr. Richard Stride was appointed as GAL while the case was pending in Grant County. He submitted two reports and a letter to that Court. Stride's reports and letter (Ex. 57, 58, 59) were also considered by

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[4] John claims, without citation to the record or legal authority, that Tomi absconded to Alaska without permission of the court. *Appellant's Brief* at p. 1. The Court should ignore this attempt to imply that such permission was required. Under Washington's Child Relocation Act, a parent with whom the children reside a majority of the time is required to give notice of their intent to relocate to other persons entitled to residential time under a court order. RCW 26.09.430; 2000 Wash. Sess. Laws, chap. 21, § 5. John has not alleged any violation of this requirement or assigned error to any ruling of the trial court on this ground.

James Cathcart, who was appointed GAL after venue was transferred to Pierce County and Stride was discharged. [5]

Cathcart investigated issues including the effects of John's alcohol use on his behavior and parenting, and allegations of domestic violence by both parties. As part of this investigation Cathcart travelled to Alaska to interview Tomi, the children and other witnesses including the children's therapist, Shayle Hutchison. Cathcart filed 4 reports and testified extensively at trial. Ex. 18, 19, 20, 96; 3 RP 436-516, 537- 555.

(i) John's concerning alcohol-related behavior.

Cathcart considered, as part of the factual basis for his report and recommendations, a 2013 assessment of John's "fitness for duty" as a police officer by Dr. Mark Mays, Ph.D., J.D. 3 RP 444; Ex. 23. Dr. Mays' report was also cited in the City's decision to terminate John's police employment. Ex. 30.

Dr. Mays concluded that John had a "Personality Trait Disturbance" in which he "behaves in impulsive, self-indulgent, and short-sighted ways, a pattern of behavior which makes him more likely than most people...to not maintain appropriate limits, maintain consistent and

[5] Dr. Stride's reports were admitted by stipulation for the limited purpose of showing they formed part of the factual basis for GAL Cathcart's opinion. 1 RP 9. Portions titled "Analysis of Response Validity" were excluded from evidence by a pre-trial Order. CP 186; Motions in Limine RP 9-10 (April 29, 2016).

appropriate behavior, show emotional constraint, or provide accurate reports." Ex. 23, at p. 12. Dr. Mays' report cautioned that findings made when assessing John's fitness for duty as a law enforcement officer did not preclude parenting, but noted that John's alcohol dependence tended to amplify these concerning personality traits. *Id.,* at pp. 13-14.

Cathcart testified that these aspects of Dr. Mays report "resonated with other facts" that came to light during his investigation, including John's pattern of investigating people who were part of Tomi's support network. 3 RP 444-446. He typically would find out where they lived, the names of their children and other facts about their personal lives and families, and then communicate with them about these things in ways that made them fearful about their personal safety, or connected to demands that they or Tomi change their position or actions in the case. *Id.*; Ex. 18, p. 32; Ex. 19, pp. 19-21.

John sent such communications to the children's therapist, Shayle Hutchison, in which he demanded that she stop working with both children or he would "consider that a personal attack on my family, and I will respond accordingly..." 2 RP 384-388; Ex. 43, last page.

John sent similar email communications to Tomi's attorneys during periods when he was self-represented in the case. Ex. 39; Ex. 19, pp. 19-21; 3 RP 488-506.[6]

John also sent Tomi a series of text messages threatening to disclose embarrassing pictures and videos of her if she did not change her position or actions in the case.[7] John followed these text messages with emails to Tomi attaching partial photos captioned "a taste – keep pushing." 2 RP 276-282; Ex. 78.

Cathcart also considered John's drinking during a 2015 domestic dispute with his father that led to a police call. 3 RP 462-463; Ex. 19 at p. 24; Ex. 28. Cathcart's concerns about John's continued alcohol use and its intensifying effects on his inappropriate behavior were not alleviated by

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[6] One such email blamed Tomi and her attorney for the loss of his law enforcement career and described dire consequences for the community: "A good cop is sidelined, trying to defend himself. Now, I am no longer in a position to rid the community of those who would seek to devour the precious sovereignties. The rights of our women, children and weaker people are in need of help everyday. The wolves run about, wild and free, while people like me are unable to do anything about it because true evil persists and I am kept from doing my job..." Ex. 39, p.4.

[7] "I do not want trouble with you. Peace is what I wish. How can we have peace? You and I were best friend, lovers and everything and now I see we are at each other's throats. I hate the thought of being your enemy. It makes me sick to my stomach....Please, tell me what I did...So what do we say to be at peace now?...Please, bud. I want peace....I feel like showing everyone the videos & pictures you asked me to make. Doubt me, please. I do care. I hope you doubt me. OK. You got it. I will file them all, & show what kind of freak you are. I trusted you and u threw me into the flames & destroyed my career. Lets see what people think of your pics and vids. You want a preview? I'm sure the courts will love to see what kind of freak u are". [sic] Ex. 79.

John's ongoing counseling with Bill Notarfrancisco, as alcohol was not addressed in their sessions. 3 RP 464; 4 RP 800. Cathcart's concerns also were not alleviated by John's treatment through the VA. John's treatment progress there was based on his self-reporting a reduction in alcohol consumption, he was still drinking, and he declined a recommendation for further treatment. Ex. 19, pp. 16-17; 3 RP 449-450; Ex. 24; *see* 1 RP 100-101.

(ii) The need for parenting restrictions on John.

Cathcart concluded that while there was insufficient evidence to support a requirement that John's time with the children be professionally supervised, his continued alcohol abuse and concerning behavior required that any unsupervised residential time be conditioned on his abstaining from alcohol, enrolling and participating for at least a year in random urinalysis, and treatment by a psychologist. Ex. 19, p. 29-31; 3 RP 450-452. He recommended treatment by a psychologist rather than by the counselor John had been seeing, because a psychologist would be better equipped to address the issues identified by Dr. Mays and because John's counselor had not done any alcohol-related work with him. 3 RP 450, 453-454; 4 RP 800.

Cathcart made clear in testimony his opinion that unsupervised residential time by John with the children was appropriate only if

conditioned on the recommended alcohol and related psychological treatment. *Id.* He clarified that his "no" answer to the question of whether he believed the children would be in danger with John was based in considerable part on his recommended treatment conditions. 3 RP 547, line 24 - 548, line 15.

Cathcart also investigated whether there were any concerns about the environment in Tomi's home, her parenting, or any other reason to be concerned about the children when they were with her, and found none. Cathcart recommended that Tomi be the primary residential parent, and that John have significant residential time during school-year breaks, summers, and other occasions. 3 RP 456; Ex. 19, pp. 26, 30.

(iii) Domestic violence.

Both the Grant County GAL, Dr. Stride, and Cathcart found it difficult to reach a conclusion or make recommendations regarding the parties' reciprocal allegations of domestic violence by each against the other. These allegations included Tomi's account of the events precipitating her departure as recounted in this brief, and John and his parents' versions of the events appearing in his brief where Tomi allegedly threatened or attacked John. *Brief of Appellant, pp. 5-8.*

Cathcart testified that the unresolved conflicting domestic violence allegations did not impact his opinion of either Tomi's or John's current or future parenting abilities. 3 RP 455-456.

F. The Court's Ruling and Orders.

Tomi and John each submitted a Proposed Parenting Plan which sought findings justifying limitations on the other parent's residential time. CP 22-23; Ex. 70. Tomi proposed a schedule and limitations tracking Cathcart's recommendations that John's residential time be conditioned on enrollment in alcohol and psychological treatment and urinalysis, and be suspended if he did not comply. CP 24-25. John proposed that the children reside primarily with him, and that the only limitations be a prohibition on either parent engaging in abusive use of conflict or emotionally abusing the children. Ex. 70, ¶ 3.10, 3.12.

(i) Oral ruling following trial.

The Court conducted trial for 6 days, with 10 witnesses and 96 marked exhibits. 1 RP 1 to 6 RP 1021; CP 38-43. At the conclusion of trial the Court issued an oral ruling on all contested issues including marital property and debt, child support, maintenance and a parenting plan for the children. 6 RP 1022- 1058. The Court described the case as "one of the top most difficult cases I've had to deal with...," in part because GAL Cathcart – who the Court praised as doing "an extraordinary job of remaining

neutral" – was unable to reach a conclusion as far as making a recommendation on the conflicting allegations of domestic violence. 6 RP 1023.

The Court found that both parties had credibility issues in their testimony, particularly regarding the disputed issue of domestic violence. 6 RP 1023-1024.

The Court found that John's alcohol dependency and the need for a § 191 factor in that regard was established "clearly, by a preponderance of the evidence, if not by a greater burden." 6 RP 1036. The court adopted Cathcart's recommendations regarding this factor and expressly declined, after referencing its review of all exhibits and testimony, to enter any other § 191 factors. 6 RP 1037-1039. The Court expressly declined to make findings justifying limitations on Tomi based on domestic violence or any other ground. 6 RP 1050-1051.

(ii) Final Orders.

The trial court entered a Final Parenting Plan June 15, 2016 using the new "plain language" mandatory form.[8] CP 71-82. Under the heading "Reasons for putting limitations on a parent (under RCW 26.09.191)" the Court found in ¶ 3.a that neither parent had problems with abandonment,

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[8] Family Law Plain Language Forms, http://www.courts.wa.gov/forms/?fa=forms.static&staticID=20 (last visited Feb. 7, 2017).

neglect, child abuse, domestic violence, assault or sex offenses requiring a limitation on parenting time. CP 71. Under the same heading, the Court found in ¶ 3.b that "John Ingersoll has a problem with drugs, alcohol or other substances that gets in the way of his ability to parent." CP 72.

John objected to this language, asking instead that the trial court check the "other" box and "include language that is more specific to the finding." Presentation RP 22. The Court declined to depart from the new "plain language" version of the statutory terms in this paragraph of the mandatory form. *Id.* Tomi proposed, and John agreed to, an additional finding in ¶ 16: "John Ingersoll's long term problem with alcohol includes or influences behavior requiring psychological evaluation and treatment." *Id.* at 23; CP 81-82.

The Final Parenting Plan's residential schedule provides for the children to live primarily with Tomi during the school year, and provides for them to spend alternating major holidays and school-year breaks with John. It also provides for them to spend one-half the summer with John, and that he can spend up to seven additional days with them in any ninety-day period during the school year. CP 74-77, ¶ 8 – 10.

John was required to enroll within thirty days in alcohol and psychological treatment, including random urinalysis testing. CP 72, ¶ 4. The duration of the treatment was to be at least a year, with further

treatment as recommended by the treating professional. *Id.* He was also required to abstain from alcohol, and submit monthly compliance reports. CP 73, ¶ 4. Positive or missed urinalysis tests or counseling visits missed without good reason result in the suspension of John's residential time until three months of compliance has been documented. *Id.*

III. SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in imposing limitations on John's parenting time under § 191(3)(c) based on the impact of his alcohol use on his performance of parenting functions. No more specific findings are required beyond referencing the statutory ground for such limitations, and substantial evidence was admitted showing a danger of harm to the children from John's alcohol use and related behavior.

The trial court did not abuse its discretion in approving a residential schedule under which the children resided primarily with Tomi. The limitations imposed under § 191(3)(c) suspending John's parenting time if he fails to comply with treatment are dispositive of who is the primary residential parent, and the trial court applied no presumptions from the temporary parenting plan.

The trial court did not abuse its discretion when it declined to make findings of a history of domestic violence against Tomi. The Court heard conflicting testimony and considered other evidence on the issue, made

credibility determinations and weighed the evidence. This court should decline to look behind those determinations, reweigh that evidence and substitute its judgment for that of the trial court.

IV. ARGUMENT

A. Standards of Review

A trial court's Parenting Plan is reviewed for abuse of discretion. *Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012), *cert. denied* __ U.S. ___, 133 S.Ct. 889, 184 L.Ed.2d 661 (2013); *Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Id.* To be manifestly unreasonable, the trial court's decision must be outside the range of acceptable choices, given the facts and the applicable legal standard. *Marriage of Pennamen*, 135 Wn.App. 790, 797, 146 P.3d 466 (2006).

The trial court's findings of fact are treated as verities on appeal, so long as they are supported by substantial evidence. *Chandola*, 180 Wn.2d at 642 (citing *Katare*, 175 Wn.2d at 35). "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted. *Id.*

An appellate court will not review the trial court's credibility determinations or weigh conflicting evidence, and will affirm unless no

reasonable judge would have reached the same conclusion. *Marriage of Kim,* 179 Wn.App. 232, 240, 317 P.3d 555, *review denied*, 180 Wn.2d 1012 (2014). An appellate court can sustain a trial court judgment on any theory established by the pleadings and proof, even if the trial court did not consider that theory. *Marriage of Kovacs,* 121 Wn.2d 795, 801, 854 P.2d 629 (1993).

B. The trial court did not abuse its discretion in finding that John had a long-term problem with alcohol that got in the way of his parenting of the children.

(i) The trial court's findings referenced the specific statutory provision authorizing limitations based on alcohol abuse.

RCW 26.09.191(3) provides, in relevant part, as follows:

> (3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:
> * * *
> (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;
> * * *
> (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

The trial court "need not wait for actual harm to accrue before imposing restrictions" and may impose them where substantial evidence shows "that a danger of ...damage exists." *Chandola,* 180 Wn.2d at 645

(quoting and citing *Katare*, 175 Wn.2d at 35-36, and *Marriage of Burrill*, 113 Wn.App. 863, 872, 56 P.3d 993 (2002)).

In *Chandola* the Supreme Court considered "what type of 'adverse effect to the child's best interests' a trial court must find before imposing parenting plan restrictions *under the catchall provision*, RCW 26.09.191(3)(g)." *Chandola,* 180 Wn.2d at 643. (emphasis added). After reviewing the specific grounds for parenting plan limitations listed in subsections (a)-(f) of RCW 26.09.191(3), the Court concluded that the legislature intended the catchall provision of subsection (g) to be limited to harm to the children that was "similar in severity to the harms posed by the 'factors' specifically listed" in subsections (a)-(f). *Id.* at 648. The Court therefore held that that "RCW 26.09.191(3)(g) [the catchall provision] does require a particularized finding of a specific level of harm before restrictions may be imposed." *Id.* at 646.

John mistakenly asserts that *Chandola* requires the trial court to "make a particularized finding identifying specific harms to the child before ordering restrictions" under any subsection of RCW 29.09.191(3). *Appellant's Brief* at 15. *Chandola* required this additional level of specificity only when the trial court relied upon the catchall provisions of § (g) rather than upon any of the types of harm already specified by the legislature as warranting restrictions in § (a)-(f). The Supreme Court

required this additional specificity to assure that restrictions under the catchall provision were imposed for reasons similarly serious to those already specified by the legislature.

Nothing in *Chandola* or any other authority requires a trial court who believes limitations on a parent's residential time are warranted based on any of the six specifically listed reasons appearing in § 191(3)(a)-(f) to make findings any more specific than referencing the applicable statutory ground.

John also mistakenly relies on *Marriage of Underwood*, 181 Wn.App. 608, 326 P.3d 793 (2014) for his assertion that detailed findings are required whenever the trial court orders restrictions under any portion of § 191(3). *Appellant's Brief* at 15. In *Underwood*, the trial court entered a parenting plan which allowed the children to decide whether their father would have any residential time with them. The Court of Appeals observed that based on the trial court's findings that factors existed warranting limitations on the father's time under § 191(3), the trial court had discretionary authority to completely eliminate the father's time. 181 Wn. App. at 612. However, before either expressly or effectively eliminating one parent's residential time, the court was required to also consider legislative policies that parent-child relationships be fostered unless inconsistent with the child's best interests, RCW 26.09.002, and

that residential provisions should encourage each parent to maintain loving, stable and nurturing relationships with the child. RCW 26.09.187(3)(a). *Id.*

The holding of *Underwood* was specific to situations in which the trial court allowed the child to decide whether to have any residential time with the non-custodial parent solely on the basis of § 191(3) factors, thereby effectively eliminating that parent's residential time, and required detailed findings supporting such a decision. 181 Wn.App. 612-613. Nothing in *Underwood* or any other authority requires a trial court which crafts a residential schedule providing for substantial residential time with the non-custodial parent, conditioned on compliance with alcohol and psychological treatment limitations warranted under § 191(3)(c), to enter more specific or detailed findings supporting that decision.

Well-settled Washington law, unaffected by the narrow holdings addressing the specific circumstances present in either *Chandola* or *Underwood*, holds that when evidence of the statutory factors is before the court and its oral opinion or written findings reflect consideration of the statutory elements, specific findings addressing each factor are not required. *Marriage of Croley*, 91 Wn.2d 288, 588 P.2d 738 (1978); *Marriage of Dalthorp*, 23 Wn.App. 904, 598 P.2d 788 (1979); *Marriage of Murray*, 28 Wn.App. 187, 622 P.2d 1288 (1981).

The trial court more than met this standard by entering an order that checked the "plain language" version of the statutory provision in § 191(3)(c):

> ☒ **Substance Abuse** - (*Parent's name)*: **John Ingersoll** has a long-term problem with drugs, alcohol, or other substances that gets in the way of his/her ability to parent. (Bold and italics original). CP 72.

The trial court also made clear at a hearing on presentation of final orders that the problem in John's case was alcohol, not other substances. Presentation RP 22. The Parenting Plan specifically adopted the statements in ¶ 3 as its findings and made an undisputed additional finding that "John Ingersoll's long term problem with alcohol includes or influences behavior requiring psychological evaluation and treatment." CP 81-82, ¶ 16.

John also cites a case decided 27 years before the adoption of Washington's Parenting Act[9] in support of his assertion that more detailed findings were required before the trial court imposed limitations on John's parenting time based on his alcohol abuse. In *Marriage of Thompson*, 56 Wn.2d 683, 355 P.2d 1 (1960), the Supreme Court affirmed the trial court's award of custody of a 13-year-old boy to his father. The mother's assertion that the father was "a drunkard" and did not bathe often enough

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[9] Parenting Act, 1987 Wash. Sess. Laws chap. 460.

was insufficient to establish an abuse of discretion by the trial court because nothing in the record indicated that the father was ever "intoxicated in public or that his drinking habit renders him incompetent in any way." 56 Wn.2d at 685. *Thompson* held only that a custody decision would not be disturbed based on alcohol use by the custodial parent where the record failed to reflect any nexus between that parent's alcoholism and his parenting abilities. It implies, but does not explicitly hold, that such a nexus would be required when basing a custody determination on alcohol abuse. *Thompson* does not address in any way the level of detail required in findings about such a nexus. In the Parenting Act the legislature has modernized the dated terminology of *Thompson* and specified the showing that is required: "[a] long term impairment resulting from...alcohol...abuse that interferes with the performance of parenting functions." RCW 26.09.191(3)(c). The record in this case contains substantial, if not abundant, evidence to support the finding made by the trial court referencing this statutory provision.

(ii) The trial court's findings were supported by substantial evidence.

John claims that the trial court's finding regarding his alcohol abuse and its effects on his parenting was not supported by substantial evidence: "There was *no evidence* presented to the trial court of any specific, serious

danger to the children's well-being from John's alcohol use." *Appellant's Brief* at pp. 17-18 (emphasis added). In support of this bald assertion, John cites positive testimony from a visitation supervisor, and characterizes GAL Cathcart's testimony as positive despite his recommendation of limitations based on John's alcohol abuse. *Id.*

John's brief ignores testimony by Cathcart and the children's therapist and other evidence about the nexus between John's alcohol abuse, anger and other concerning behavior, and the adverse impact of these things on the children.

Cathcart testified, based on Dr. Mays' report and his own investigation, that John's alcohol abuse exacerbated personality traits which made him prone to behave in impulsive, self-indulgent and short-sighted ways. 3 RP 444-446. Tomi testified that John yelled and spanked the children when he was drunk. 1 RP 201. Her main concern about the children when they were with John arose from his drinking and related behavior. 1 RP 286-287. Cathcart testified that the children had seen John angry enough that they were "apprehensive of his anger" even if they were not specifically afraid he would turn it on them. 3 RP 515.

KAI was not excited to see her father because he "gets mad at me." Ex. 59, p. 2. Further inquiry by Dr. Stride revealed that KAI's primary concern was John's behavior over Skype visits. *Id.* In one incident

detailed by Stride, John called KAI a "fricken traitor" for not sitting in front of the computer screen, used language that became "depressive and accusatory," and at one point cried and threw a ring at the computer screen. *Id.*; Ex. 19, pp. 14-15.

FMI adamantly refused to discuss his father with Cathcart at all. *Id.* 3 RP 458. However, FMI told his therapist Shayle Hutchison that "he is afraid when his father drinks alcohol" and would retreat into his bedroom and play with Legos to distract himself from the yelling and loud noises during his parents' fights. Ex. 27B. Hutchison testified that FMI told her he was both angry at and afraid of his father. 2 RP 367-368. Hutchison reported an increase in the intensity of FMI's traumatic symptoms, including nightmares, anxiety and hyperactivity, before and after visits with John. 2 RP 379-380.

Based on her education and experience (Ex. 40) and her treatment of FMI, Hutchison diagnosed him with post-traumatic stress disorder. 2 RP 380-381. Hutchison's opinion was that "I think [FMI] has a very difficult relationship with his father. I think that he is afraid of his father and that he has experienced trauma as a result of his relationship with his father." 2 RP 380.

Cathcart also reported that John misused Skype visits with the children to interrogate them about their mother and express his frustration with the

legal system, rather than to strengthen his relationship with the children. Ex. 18, pp. 32-33. "The obvious concern is whether or not he will be able to restrain those impulses if the children are with him here and he isn't on video." Ex. 18, pp. 32-33.

This evidence is more than sufficient to persuade a fair-minded person of the truth of the trial court's finding in ¶ 3.b of the Parenting Plan: that "John Ingersoll has a long-term problem with... alcohol...that gets in the way of his ability to parent." CP 71-72. An appellate court does not re-weigh conflicting evidence, so John's citation to testimony and other evidence that was complimentary about his parenting has no bearing on this court's determination of whether there was substantial evidence to support the trial court's finding. *Marriage of Kim*, 179 Wn.App. at 240.

C. The trial court did not abuse its discretion by entering a Parenting Plan under which the children resided primarily with Tomi but visited frequently with John.

(i) § 191 limitations are dispositive of whether Tomi or John is the primary residential parent.

RCW 26.09.187(3) provides, in relevant part, as follows:

> (3) RESIDENTIAL PROVISIONS
>
> (a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. *The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are*

> *not dispositive of the child's residential schedule, the court shall consider the following factors*:
> * * * * *
>
> (b) *Where the limitations of RCW 26.09.191 are not dispositive, the court may order that a child frequently alternate his or her residence between households of the parents* for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.
>
> (c) For any child, residential provisions may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of residential time by a parent, ... (italics added).

The § 191 limitations imposed on John in ¶ 4 of the Parenting Plan required him to enroll within thirty days in alcohol and psychological treatment, including random urinalysis testing. CP 72, ¶ 4. The duration of the treatment was to be at least a year, with further treatment as recommended by the treating professional. *Id.* He was also required to abstain from alcohol, and submit monthly compliance reports. CP 73, ¶ 4. Positive or missed urinalysis tests or counseling visits missed without good reason result in the suspension of John's residential time until three months of compliance has been documented. *Id.*

Tomi lives in Fairbanks, Alaska and John lives in Lakewood, Washington. CP 74. Their homes are 1,521 flight miles[10] and 2,278 road miles[11] apart. In this context, the limitations imposed on John are necessarily dispositive of whether Tomi or John would be the primary residential parent of school-age children. If John were the primary residential parent but failed to demonstrate compliance with required treatment conditions, the suspension of his residential time until 3 months of compliance was shown would mean the children could be required to change schools and treatment providers twice in as short as a 4-month period: first to leave Lakewood and go to Fairbanks while John re-established treatment compliance, then returning to Lakewood once he did comply. Such a circumstance is clearly not in the children's best interests. Designating Tomi as the primary residential parent and making provisions for the children to have significant residential time and Skype contact with John assures that even if his residential time were suspended for non-compliance with required treatment, the children's school and counseling will not be disrupted.

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[10] Travel Math, http://www.travelmath.com/flying-distance/from/Fairbanks,+AK/to/Seattle,+WA (last visited Feb. 7, 2017).

[11] Distance between Cities, http://www.distancebetweencities.net/fairbanks_ak_and_lakewood_wa/ (last visited Feb. 7, 2017).

The Final Parenting Plan's residential schedule provides in ¶ 8.b for the children to live primarily with Tomi during the school year. CP 74. It states that "[d]ue to the geographic distance between the parties" John's time during the school year will occur during alternating major holidays and school-year breaks, as prescribed in ¶ 10. *Id.* The Parenting Plan also provides in ¶ 9 for the children to spend one-half the summer with John. CP 75. John may also exercise up to 7 additional overnights in any 90-day period during the school year. CP 74. This residential schedule provides John with approximately 80 overnights[12] with the children each year. In addition to this residential time, John has Skype visits with the children 30 minutes per week. CP 80-81.

This residential schedule is, as required by RCW 26.09.187(3), consistent with the § 191 limitations on John while still encouraging the continuation of a loving, stable and nurturing relationship between him and the children. The Parenting Plan's residential schedule designating Tomi as the primary residential parent and providing significant time with John was well within the range of acceptable choices, given the facts and applicable legal standards, and therefore not an abuse of discretion. *Pennamen,* 135 Wn.App. 790.

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[12] 6 weeks each summer = 42 days; 7 days in any 90-day period during the school year = 21 days; odd years' holiday schedule = 18 days; even years' holiday schedule = 17 days; totaling 81 days in odd years; 80 days in even years. CP 74-77.

(ii) The court applied no presumptions from the temporary parenting plan.

As discussed above, the trial court's designation of Tomi as the primary residential parent was necessary to implement the limitations imposed on John's residential time under § 191(3)(c), making explicit analysis of the factors listed in RCW 26.09.187(3)(a) unnecessary when crafting a residential schedule. Ignoring this relationship, John argues that the trial court's decision to designate Tomi as the primary residential parent "was based almost entirely on Tomi's success as the residential parent under the temporary parenting plan." *Appellant's Brief* at 23.

John quotes remarks by the trial court to support this assertion, but omits a key (and inconvenient) portion of those remarks. The quote from John's brief appears below, with the omitted portion supplied from the unabridged Verbatim Report of Proceedings appearing in italics:

> So while, on the one hand, the Court is not supposed to be looking at a temporary order in entering a final parenting plan, one can't help but look at the circumstances that have existed for four years. The children have lived primarily with Mom, and they've lived in Alaska, so they've had a long-distance relationship with their father for four years. That makes it very difficult for the Court to *–all things being equal, which I don't believe they are, but all other things being equal* – then say, Well, Dad would then become the primary residential parent.

6 RP 1026. These statements were made as part of the court's introductory remarks about the difficulty of the case. 6 RP 1022-1027. When later

stating its ruling, the court left no doubt about the significance of its § 191 findings regarding a need for alcohol-based limitations on John:

> I mean, I think it's pretty clear, and perhaps beyond dispute so I'll just put this part behind us, that Mr. Ingersoll, I think, clearly, by a preponderance of the evidence, if not by a greater burden, has an alcohol dependency issue, and we're going to impose a .191 factor and the recommendations with respect to that...

6 RP 1036-1037.

RCW 26.09.191(5) states as follows:

> (5) In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan.

In *Marriage of Kovacs*, 121 Wn.2d 795, 854 P.2d 629 (1993) the Supreme Court rejected the argument that the Parenting Act of 1987 contained a presumption in favor of the primary caregiver, noting this statute's bar on drawing any presumptions from the temporary parenting plan. 121 Wn.2d at 809. In *Marriage of Combs,* 105 Wn.App. 168, 19 P.3d 469 (2001) the Court of Appeals observed that the trial court may have improperly applied a presumption in favor of the status quo when, after concluding that its analysis of the appropriate factors resulted in a "tie" between the parents, it broke that "tie" by relying on the fact that the mother had performed well as primary residential parent during the pendency of the temporary parenting plan. 105 Wn.App. at 176-177.

Here, there is no claim the trial court applied a "primary caretaker" presumption. The portion of the court's remarks omitted from John's brief - *all things being equal, which I don't believe they are* –makes clear the trial court was not breaking a "tie." Neither *Kovacs* nor *Combs* apply.

No Temporary Parenting Plan was admitted (or even offered) in evidence. The trial was heard in Pierce County, after a change in venue from Grant County, where the temporary parenting plan was entered. 6 RP 1025. An order denying John's motion for revision of a temporary parenting plan entered by a Commissioner in Grant County was admitted, for the limited purpose of showing that it had been considered by GAL Cathcart. Ex. 87, 3 RP 441. Cathcart testified he did not treat the fact that this order included findings of a history of domestic violence and abusive use of conflict by John as dispositive of those issues. 3 RP 441. The trial court also expressly declined to make such findings at the conclusion of trial. 6 RP 1037-1039. There is no evidence that the trial court relied on the temporary parenting plan as creating any presumptions when crafting the residential schedule.

For all these reasons, the Parenting Plan's residential schedule, including designation of Tomi as the primary residential parent, was not an abuse of discretion. Even if the trial court failed to fully articulate its analysis under RCW 26.09.187(3) in its oral ruling, its decision must be

affirmed because it is adequately supported by the evidence admitted at trial. *Kovacs*, 121 Wn.2d at 801; *Weiss v. Glemp*, 127 Wn.2d 726, 730, 903 P.2d 455 (1995).

D. The trial court did not abuse its discretion by declining to make a finding of a history of domestic violence against Tomi.

John claims that the trial court "expressly found that neither parent had engaged in domestic violence." *Appellant's Brief* at p. 20. John then claims that this finding was not supported by substantial evidence and that the trial court was required to find that Tomi had engaged in a history of acts of domestic violence, because "[t]he unchallenged evidence is that Tomi threatened to kill John with a kitchen knife and engaged in other acts of domestic violence under the statutory definition." *Appellant's Brief* at pp. 21-22. John's brief mischaracterizes both the trial court's ruling and the evidence. This court should decline John's request that it look behind the trial court's credibility determination, re-weigh the evidence and substitute its own judgment for that of the trial court.

(i) The trial court has discretion to determine whether the evidence meets the requirements for § 191 limitations.

A parent's residential time "shall be limited if it is found that the parent has engaged in . . . a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm." RCW 26.09.191(2)(a).

"[T]he term 'history of domestic violence' was intended to exclude 'isolated, de minimus incidents which could technically be defined as domestic violence.'" *In re Marriage of C.M.C.*, 87 Wn. App. 84, 88, 940 P.2d 669, 671 (1997), *aff'd sub nom. Caven v. Caven*, 136 Wn.2d 800, 966 P.2d 1247 (1998). Mere accusations of domestic violence "are not sufficient to invoke the restrictions under the statute." *Caven v. Caven*, 136 Wn. 2d 800, 809, 966 P.2d 1247, 1251 (1998). The trial court has discretion to determine whether the evidence meets the requirements of RCW 26.09.191. *Caven*, 136 Wn.2d at 806.

(ii) The trial court heard conflicting testimony regarding domestic violence.

John and Tomi each alleged that the other had committed acts of domestic violence against them. *See gen. Appellant's Brief* at pp. 5-8, *Respondent's Brief* at pp. 3-5. Each of their testimony featured allegations of violent or threatening acts toward the other for which the actor offered at least a partial denial or further explanation of context. For example, John denied leaping on Tomi, pinning her down "or anything like that" but did not specifically deny wearing, drawing or pointing his service weapon during their argument on May 20, 2012. 4 RP 650-651. Tomi admitted grabbing a kitchen knife and threatening to harm John or herself, explaining she became distraught when he took and withheld their infant

daughter during an argument in 2004. 1 RP 208-211. John testified Tomi burst into the bathroom and pummeled him on the chest but denied having first grabbed and held Tomi as she described. 1 RP 206-207; 3 RP 577. John and his parents described Tomi as "strangling" John in another incident, but Tomi denied choking or striking John, explaining she was just trying to intervene between him and her brother. 3 RP 579-580; 5 RP 858; 6 RP 942; 1 RP 207-208.

In addition to this conflicting testimony, the trial court considered documentary evidence relevant to allegations of domestic violence. Domestic Violence Protection Orders issued in Alaska contained findings that John had committed domestic violence toward Tomi. Ex. 36, 37. Those findings were affirmed on appeal, and the Alaska protection order was continued in effect through trial of this case in Washington. Ex. 38, 77. The trial court also admitted text messages and emails in which John threatened to file embarrassing pictures of Tomi in court if she did not make peace with him. Ex. 78, 79.

The Grant County GAL, Dr. Stride, declined to investigate or offer any opinion on domestic violence allegations. Ex. 57, p. 17. Pierce County's GAL, James Cathcart, found it difficult to reach a conclusion or make recommendations regarding the parties' reciprocal allegations of domestic violence, and testified that they did not impact his opinion on the

parenting abilities of either party. 3 RP 455-456. Cathcart's inability to reach a conclusion or make recommendations on this issue made the case a particularly difficult one for the trial court. 6 RP 1023.

(iii) The trial court's credibility findings and weighing of the evidence should not be disturbed.

After hearing all this conflicting testimony and reviewing the exhibits, the trial court expressly declined to make findings providing any further basis for limitations under § 191 other than regarding John's alcohol use, as discussed earlier in this brief. 6 RP 1037, 1039 & 1050. Contrary to John's assertion, the trial court did not make an affirmative finding that "neither parent had engaged in domestic violence." *Appellant's Brief* at p. 20. Instead, after a lengthy discussion about the difficulties of the case, conflicting testimony, and the credibility of the parties, the trial court simply stated, "[W]hile I'm going to enter a [RCW 26.09].191 factor for alcohol and impose the conditions that have been requested with regard to that, . . . I'm not going to enter any other [RCW 26.09].191 factors . . . ." 6 RP 1038-1039. In response to a question by John's counsel, the trial court expressly declined to find a basis for § 191 limitations against Tomi on any of the grounds asserted by John. 6 RP 1050.

The Court found that both parties had "credibility issues" in their testimony, particularly regarding the disputed issue of domestic violence. 6 RP 1023-1024. Tomi argued that John's testimony was not credible because he was impeached several times with prior inconsistent statements, changed his story when convenient, and repeatedly avoided questions, instead arguing or answering the question he wished had been asked. 6 RP 977-980. The Court stated it mostly agreed with that assessment of John's credibility. 6 RP 1023. However, the Court also had concerns about Tomi's credibility, mostly because the Court felt her affect was inconsistent with some of her statements during testimony. 6 RP 1023-1024, 1035-1036. The Court acknowledged that the apparent inconsistency "may be a cultural issue...it may be something other than truly a credibility issue," but found it nevertheless difficult to reconcile. 6 RP 1024.

Appellate courts do not "review the trial court's credibility determinations or weigh conflicting evidence." *In re Marriage of Rostrom*, 184 Wn.App. 744, 750, 339 P.3d 185, 188–89 (2014); *see also In re Marriage of Fiorito*, 112 Wn.App. 657, 667, 50 P.3d 298, 304 (2002); *In re Marriage of Rich*, 80 Wn.App. 252, 259, 907 P.2d 1234, 1237 (1996). This is because the trial court is better positioned to evaluate witnesses' credibility in child custody matters, having seen and heard

them testify. *Chatwood v. Chatwood,* 44 Wn.2d 233, 240, 266 P.2d 782 (1954). Thus, appellate courts will not substitute their own findings for those of the trial court if the trial court's findings are supported by substantial evidence, even if other evidence contradicts them. *In re Marriage of Kovacs*, 121 Wn.2d 795, 810, 854 P.2d 629, 637 (1993).

In this case, the trial court was presented with conflicting evidence regarding domestic violence and had concerns about the credibility of witnesses on this issue. The Court's lengthy oral ruling reflects that it considered all of the evidence, worked to reconcile and weigh it, and ultimately declined to make a finding that there was a basis upon which to impose parenting limitations on either party due to a history of acts of domestic violence. This Court should decline John's request that it look behind the trial court's credibility findings, reweigh the evidence and substitute its own judgment for that of the trial court on this issue.

V. CONCLUSION

The trial court did not abuse its discretion in finding that John's long-term alcohol abuse got in the way of his parenting, or in imposing limitations on his residential time requiring treatment for his alcohol abuse and behavior. Similarly, the trial court did not abuse its discretion in entering a residential schedule which treated those restrictions as

dispositive of which parent the children would reside with a majority of the time, while providing for John to have significant residential time conditioned on his compliance with required treatment. This Court should not substitute its own judgment for the trial court's credibility determinations and weighing of conflicting evidence regarding the need for parenting restrictions based on allegations of domestic violence by either party. The trial court should be affirmed on all issues.

Respectfully submitted this 10th day of March, 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on March 10, 2017 I caused the original of the foregoing document to be filed and served by the method/s indicated below, and addressed to each of the following:

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